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No. 80-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE AMERICAN TOBACCO COMPANY, *et al.*,
Petitioners,

v.

JOHN PATTERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS BAKERY, CONFECTIONERY AND TOBACCO WORKERS INTERNATIONAL UNION AND ITS LOCAL 182

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ARGUMENT

I. RESPONDENT EEOC'S ALTERNATIVE STATUTORY INTERPRETATION

Respondent EEOC, recognizing that the judgment below cannot be sustained on the lower court's rationale, unceremoniously abandons that rationale in favor of a contrived dichotomy between the adoption and implementation of *bona-fide*, post-Act seniority systems. Section 703(h) states that "it shall not be an unlawful employment practice . . . to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system . . . provided that such differences are not the result of an intention to discriminate." The EEOC concedes that those words were meant to protect the use of such seniority systems whether adopted before or after the effective date of Title VII. But the EEOC argues that,

by the words of § 703(h), Congress intended that a union and an employer may be found to violate Title VII by *adopting* without "an intention to discriminate" a "bona fide seniority system" whose every "appl[ication]" is protected by § 703(h). As we show below, the EEOC's interpretation of § 703(h) flies in the face of the language of that provision and would undermine a major purpose Congress meant that provision to serve.

The proper reading of § 703(h) is that the provision delineates the class of systems whose operation Congress wished to protect—"bona fide seniority systems" that are not the product of "an intention to discriminate." The critical point is the Congressional decision to protect that class of seniority systems, but not others. The EEOC's reading of § 703(h) would make it illegal to adopt, and in reality to apply, seniority systems that fall precisely within that protected class, and thus would thwart the Congressional design.

For all practical purposes, in the context of a Title VII challenge to a seniority system there is no way to separate adoption of a system from application of the system. The illusory nature of the EEOC's distinction between "application" and "adoption" is apparent when one considers the putative basis for a challenge to the *adoption* of a system and what might be the remedy for such a challenge. The *adoption* of a system in and of itself could have no adverse impact upon anyone; only its admittedly lawful *application* could have such an impact. Thus, under the EEOC's theory, the *adoption* of a seniority system could be a violation only if its *application* would result in an " 'artificial, arbitrary and unnecessary barrier[] to employment * * * which operates to exclude [blacks and] cannot be shown to be related to job performance.' " EEOC Br. 29 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431). And, the remedy for the "adoption" violation EEOC would create, to be meaningful, would necessarily include an injunction against *application* of the system

(and presumably backpay for any black employees adversely affected by *application* of the system). If the remedy did not forbid the *application* of the system (and compensate the victims of such *application*), it would be meaningless. Yet, if the remedy did forbid the *application* of a bona fide seniority system adopted without an intention to discriminate, it would be forbidding precisely what the EEOC concedes Congress meant to protect—precisely what § 703(h) tells employers and unions they may lawfully do.

There is not a word in the legislative history to suggest that Congress meant to distinguish between adoption and application of a bona fide seniority system. Bereft of such support, the EEOC puts forward its reading of § 703(h) as a *post hoc* means to "reconcile[]" § 703(h) "with the central purposes of Title VII . . . while not enforcing the court of appeals' more far-reaching . . ." interpretation of Title VII. EEOC Br. 18. The EEOC's hypothesis is that "no purpose of Section 703(h) would be served—and the central purpose of Title VII would be disserved—by" the interpretation of § 703(h) submitted by the petitioners. *Ibid.* But the EEOC's own reasoning negates that hypothesis.

The EEOC fashions its interpretation of § 703(h) as if the only Congressional consideration underlying that provision were the protection of employee seniority expectations. Once having arrived at its interpretation, however, the EEOC then acknowledges that there was at least one other Congressional interest in enacting § 703(h). In the EEOC's words,

> [T]he seniority principle . . . is of "overriding importance" in collective bargaining and in the organization of the workplace. . . . In considering Title VII and Section 703(h), Congress recognized that unions almost universally use seniority to allocate scarce benefits among their members. . . . The seniority principle is thus often vital to a union's efforts to aggregate and reconcile the conflicting in-

> terests of those it represents . . . a central aspect of a union's role under the federal labor laws.
>
> Accordingly, Congress may well have believed that to require a union to show that seniority serves a business necessity would undermine one of the central institutions of collective bargaining. Specifically, the business necessity requirement is not well suited to justifying the use of the seniority principle itself—that is, length of service—as a criterion. . . . The principal justification for using seniority as a criterion lies in tradition, and in employees' general willingness to accept it as a fair basis for allocating scarce benefits. [EEOC Br. 30-31.]

But that Congressional interest in the "seniority principle" is not served by the EEOC's interpretation of § 703(h). For the EEOC's interpretation would make the *adoption* of bona fide seniority systems fashioned to serve precisely the purposes listed in the quoted passage unlawful unless the proponents of the system could satisfy the "business necessity requirement"—a result directly contrary to what the EEOC acknowledges was the Congressional intent.

Apparently aware of this defect in its argument, the EEOC turns to the particular system at issue here and claims that this system, albeit by hypothesis bona fide, does not implicate the Congressional purpose in protecting the operation of the "seniority principle . . . in collective bargaining and in the organization of the workplace." Thus, the EEOC states:

> This case, however, does not concern a union's role in reconciling employees' conflicting interests by using a measure that is generally accepted as legitimate; nor does it involve dispensing preferential treatment "on the basis of * * * time served in employment," *California Brewers Association v. Bryant, supra*, 444 U.S. at 606. The lines of progression are a constraint that was imposed on the use of seniority in order to serve management objectives. [EEOC Br. 31.]

As we show in the margin, the EEOC is wrong both in its assertion that § 703(h) is directed only at union and employee interests and in its assertion that the part of the system here at issue is necessarily the product solely of "management objectives."[1] And, equally fatal to its analysis, the EEOC has offered an interpretation of § 703(h) that would apply generally and has offered a justification of that interpretation that does not fit the general situation but only what EEOC wrongly perceives to be the particular facts of this case.[2]

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[1] Earlier in its brief, the EEOC makes a point of the fact that "[b]y its terms Section 703(h) applies only to employers, not to unions." EEOC Br. 21 n. 22. In fact, it is not uncommon for employers to establish seniority systems in non-union plants. See, *e.g.*, *EEOC v. E. I. DuPont de Nemours*, 445 F. Supp. 223, 248-249 (D. Del. 1978) (rejecting claim that § 703(h) does not apply to an employer's unilaterally adopted seniority system). A bona fide employer seniority system is plainly covered by the terms of § 703(h). Moreover, as we have shown in text, *supra* at p. 3, the EEOC concedes that Congress believed "the seniority principle . . . is of 'overriding importance' in collective bargaining . . . ." And this Court has recognized that seniority systems emerge from "the give and take of free collective bargaining," "reflecting as they do . . . the specific characteristics of a particular business or industry." *California Brewers*, 444 U.S. at 608. For purposes of § 703(h), it is immaterial which party to collective bargaining was the moving force behind a particular aspect of a seniority system. *Ibid.* See also, n.2, *infra*.

Nor should it be assumed that narrowness in a seniority system invariably reflects only the employer's desires. As stated in the treatise recognized by this Court to be definitive (Slichter *et al.*, at 140, cited *infra* at 9), the "formulation of [seniority] rules themselves requires the compromise of a great variety of competitive interests among union members." See also, Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1535 (1962).

[2] EEOC's analysis logically suggests not the construction of § 703(h) it urges (under which application of *all* bona fide systems is protected, but adoption of such systems is not protected); rather, the EEOC's analysis suggests a construction under which both adoption and application of employee-favored systems are protected, but neither adoption nor application of systems that serve

Thus, the EEOC is, by its own analysis, incorrect in its initial statement that "no purpose of Section 703(h) would be served" by the interpretation of § 703(h) offered by petitioners. See *supra* p. 3. The other premise of the EEOC's hypothesis—that "the central purpose of Title VII would be disserved" by petitioners' interpretation of § 703(h)—is equally wrong.

The EEOC states that "Congress enacted Section 703(h) not to 'narrow [the] application of * * * [T]itle [VII]' or undermine its basic objectives but only to 'clarif[y] its * * * intent and effect.' 110 Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey) . . . ." EEOC Br. 18 (brackets in original). The EEOC apparently takes Senator Humphrey's statement to mean that Title VII, in §§ 703(a) and (c), was meant prior to the addition of § 703(h) to outlaw innocently motivated seniority systems that perpetuate the effects of pre-Act discrimination—unless justified by business necessity—and thus that § 703(h) should be read as narrowly as possible to minimize the interference with the objectives of §§ 703(a) and (c). But Senator Humphrey's statement cuts in quite a different direction. If § 703(h) was not meant to "narrow [the] application" of §§ 703(a) and (c), and if § 703(h) requires proof of a discriminatory intent before a seniority system can be successfully challenged, then it follows that §§ 703(a) and (c) were not intended in the first place to outlaw seniority systems that are not motivated by an intent to discriminate. The EEOC "implicitly acknowledges" as much when it states

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only management's objectives is protected. For if the EEOC were correct that § 703(h) was not meant to protect a *bona fide* seniority system serving only management's objectives, it would follow that § 703(h) protects neither the adoption nor the application of such a system. The result would be to add the following unwritten exception to § 703(h)'s assurance that "an employer" may differentiate between employees based on a "bona fide seniority system": "except where the employer has established the system to serve his own purposes." Presumably, that exception would be applicable as well to merit systems and incentive systems, which are linked with seniority systems in the language of § 703(h).

that "statements of House proponents of Title VII about its effects on seniority, and statements made by Senate proponents before § 703(h) was proposed, are evidence of the meaning of § 703(h)." EEOC Br. 23 n. 23; see also Union Br. 26-27. Thus, the "central purpose" of Title VII *never* included the invalidation of innocently-motivated seniority systems, and § 703(h) should not be given an artificially narrow construction in deference to values Congress never shared.

II. RESPONDENTS' ALTERNATIVE GROUND FOR SEEKING AFFIRMANCE

1. The Patterson respondents proffer as an alternative basis for affirmance that the "line of progression" policy does not constitute a component of a "seniority system" entitled to the protection of § 703(h). The factual predicate for their argument is stated as follows (Pat. Br. 21):

> When a vacancy occurs in one of the top jobs in a line of progression, only employees who have held a lower job in that line are eligible to bid on the vacancy. (App. 21-22). Among the eligible bidders, promotion is not determined by either seniority in the lower job or seniority in the line of progression; rather, branch seniority controls.

For the latter proposition, respondents do not cite any finding made by the lower courts. Rather, they contend that counsel for petitioners admitted in their briefs filed with the courts of appeals that plant seniority[3] controls within the lines of progression (Pat. Br. 21-23, n. 25). However, as respondents are obliged to acknowledge, counsel for petitioners *later* advised the court of appeals that their earlier statements were factually incorrect, and that upon checking further they had discovered that

[3] In this Company each plant is referred to as a "branch." The court of appeals used the term "branch seniority," whereas the district court used the term "plant seniority." The two terms are synonymous.

"for promotion to a permanent vacancy above the entry level within most lines of progression, job seniority in the immediately proceeding job is controlling" (Pat. Br. 23, n. 25). Respondents *concede* that if the facts are as later reported by counsel to the court of appeals, those lines of progression utilizing job seniority are part of a "seniority system" within the meaning of § 703(h) (Pat. Br. 100-102).

The court below refused to address respondents' contention on this confused state of the record. While noting that the earlier representations of counsel for petitioners furnished "considerable support" for respondents' assertion that plant seniority controlled advancement within the lines of progression (JA 143, n. 3), the court continued:

> This was not, however, a factual issue directly litigated in the case and the record as presently composed is ambiguous on it. In view of our stated basis for deciding that 703(h) has no application to seniority systems instituted after the effective date of Title VII, we need not address this as a possible alternative basis for decision. [*Ibid*].

In light of the court of appeals' statement that the factual issue constituting the essential predicate for respondents' alternative argument was "not directly litigated in the case," respondents are foreclosed from asserting their alternative claim in this lawsuit. As plaintiffs, it was their burden to make a factual record sufficient to enable decision of the legal claim they now advance; they having failed to do so, the issue simply is not presented. And even if that failure were to be somehow excused, the court of appeals' further conclusion that the record is "ambiguous" with respect to the fact essential to the claim would in any event make this a particularly appropriate case for application of the the Court's usual policy not to resolve issues "not passed upon by the court [below] nor adequately presented here," *Aetna Casualty Co. v. Flowers*, 330 U.S. 464, 468.

See also, *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388, 397-398; *Youakim v. Miller*, 425 U.S. 231, 234.

2. We do not mean by the foregoing to suggest that if the facts were as respondents proffer the lines of progression would be unprotected by § 703(h). Quite the contrary, against the remote chance that this Court might opt to reach this issue despite the imperfect state in which it is presented, we proceed to show that even if advancement within the lines of progression were controlled by plant seniority § 703(h) would be fully applicable.

In *California Brewers Ass'n v. Bryant*, 444 U.S. 598, this Court explained that § 703(h) protects

> more than simply those components of any particular seniority scheme that, viewed in isolation, embody or effectuate the principle that length of employment will be rewarded. In order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment.[16]

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[16] See generally S. Slichter, J. Healy, & E. Livernash, *The Impact of Collective Bargaining on Management*, 115-135 (1960). [444 U.S. at 606-607].

At the referenced pages in the seminal Slichter treatise, the authors explain that there are two basic components of every seniority system—the *measure* of seniority, and the unit or "scope of application" of seniority (*i.e.*, the definition of the employees who will be eligible to compete for a particular opportunity):

> A distinction should be made between the "unit" of seniority or its scope of application, and the measurement of, or ranking by, seniority. . . . For example, the phrase "departmental seniority" could have one or both of two meanings. It might mean that the least senior worker in a particular department will be the first laid off, yet ranking in the department might be based on total service with

> the company. In this sense, the term "departmental seniority" refers to the unit for purposes of applying seniority. Or the term may refer to the measurement of seniority; that is, the employees within the department will have their relative status determined by their length of service in the department. It could mean both if the measurement is based on the unit of application.
>
> The scope of the seniority unit and the measurement of service vary according to the use to which the seniority criterion is being put. . . . [W]here competitive job rights are at stake, there may well be one scope-measurement amalgam for temporary layoffs, another for permanent layoffs, another for promotions, and still others for different preferential treatments to be accorded senior employees. To illustrate, a broad unit is likely to apply in the case of layoffs, thus enhancing the chance of a senior man to be retained during a period of work curtailment. In the case of promotion a narrow unit is more likely to govern. [Slicter, *et al.*, at 116-17].

Respondents concede—and this Court has made clear—that § 703(h) protects a decision by an employer and union to limit the unit of competition for a particular opportunity to those employees within a given line of progression or to those holding a particular job (Pat. Br. 100-102). See *Teamsters v. United States*, 431 U.S. 324, 355, n. 41:

> [In 1964], as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression . . . The legislative history contains no suggestion that any one system was preferred.

See also, *California Brewers*, 444 U.S. at 608. By definition, a system under which seniority is measured by "length of time . . . in a job" limits the unit of competition to those who have held that job, and a system under which seniority is measured by "length of time . . . in a line of progression" limits the unit of competition to those who have worked in that line of progression.

Respondents, contend, however, that the parties here, having chosen to confine the unit of competition for certain jobs to those who have held the next lower job, lost the protection of § 703(h) by selecting length of service in the plant, rather than length of service in the job, as the *measure* of service for that competition. But *Teamsters* provides the complete answer to that contention: as among the possible choices, "[t]he legislative history contains no suggestion that any one . . . was preferred", 431 U.S. at 355, n. 41.

Respondents argue that if plant seniority is the *measure* of competition, limiting eligibility to compete to those incumbent on particular jobs interposes an "eligibility" requirement that is external to the seniority system, just as would limiting eligibility to those who had a college degree. (Pat. Br. 106-107). But, again, respondents' argument is really with the measure of seniority chosen in collective bargaining, and not with the rules defining who may compete. The definition of the unit of competition here is precisely the same as it is in a pure job seniority system, which, as we have discussed, respondents acknowledge is protected by § 703(h). Thus, the definition of the unit of competition as occupancy on a particular job creates the same "eligibility requirement" as in the job seniority system respondents concede is protected.

Moreover, in *California Brewers*, this Court rejected an argument analytically indistinguishable from that of respondents. In that case, the seniority agreement defined the "unit of competition" as limited to those employees who were classified as "permanent," but used plant or industry service as the measure of competitive seniority. The Court ruled that the fact that that system had a measure of competition that was broader than the unit of competition did not deprive the system of the protection of § 703(h). 444 U.S. at 609.

Respondents contend finally that a system defining the *unit of competition* more narrowly than the *measure* of

seniority "depart[s] significantly from commonly accepted concepts of 'seniority' " (Pat. Br. 103-104). That contention is refuted by both the Slichter treatise and an authoritative Labor Department study of collective bargaining provisions.[4]

In sum, respondents' effort to take such systems outside the protection of § 703(h) is foreclosed by the construction given that section in *Teamsters* and *California Brewers*.[5]

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[4] See U.S. Dept. of Labor, Bulletin 908-11, *Collective Bargaining Provisions-Seniority* (1949), 15, listing as a traditional seniority system "seniority applied by department but computed on the basis of total plant or company service." And Professors Slichter *et al.* point with approval to the

> trend . . . toward the use of a single seniority date, usually the date of hire in the company or the plant, regardless of the units of seniority application. Ranking *within any given unit* by date of original hire in the company is becoming more prevalent.

Slichter *et al.*, *supra*, 117 (emphasis added).

[5] Respondents' proffered interpretation would accord § 703(h) consequences that Congress could not conceivably have intended. For under respondents' interpretation, the narrowest seniority systems—those that have the greatest disparate impact upon victims of past assignment discrimination—would enjoy the protection of § 703(h), while broader systems that enable those victims to advance more rapidly to the better jobs in the plant would not. Thus, under the system that respondents concede is protected by § 703(h) —that in which advancement is governed by seniority on the preceding job—a black employee discriminatorily assigned prior to Title VII to a different part of the plant would first have to secure a transfer to the lowest job in a line of progression, and upon transferring would be last-in-line among the occupants of that job in ability to progress to the next job in the line; and that same disability would be encountered at each step up the line of progression. This reality, including the deterrent effect it has upon employees' willingness to transfer, is described in Slichter, *et al.*, *supra*, at 117-118. By contrast, if advancement up the line of progression is on the basis of *plant* seniority, the discriminatee upon securing a transfer to a new line of progression would be able to compete for promotions using his full plant seniority; he

III. THE PATTERSON RESPONDENTS' ALLEGATIONS OF INTENTIONAL DISCRIMINATION

The arguments in the brief for the Patterson respondents respecting the language and history of §703(h) all are adequately addressed in our opening brief. But those respondents devote the majority of their brief to a lengthy but wholly irrelevant exegesis of claimed intentional discrimination in other industries, other plants, as well as in the plants involved in this case. But in the present posture of this case the seniority system here is assumed to be *bona fide*.[7] The issue here is purely one of statutory interpretation: is § 703(h) applicable to *bona fide* seniority systems adopted after the effective date of Title VII. Respondents' allegations regarding intentional discrimination are immaterial here. If our interpretation of § 703(h) is sustained, respondents will have a full opportunity on remand to prove, if they can, that the lines of progression like the policy regarding company-wide transfer are not *bona fide*.

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would not automatically be last-in-line for each promotion, and indeed might well be first-in-line.

[7] EEOC contends that the lines of progression were not *bona fide*. EEOC Br. 35. The *en banc* court concluded that not only were there no findings of fact by the trial court to support such a conclusion, but that it is doubtful "[w]hether there is evidence to support the requisite findings of fact . . . [.]" JA 146. An inquiry as to the *bona fides* of other parts of the seniority system has already been ordered by the court below, and surely any initial fact-finding should be done in the district court rather than this Court.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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